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Private Employer Drug Testing: Invading At-Will Employees' Privacy—Is It a Tort in Nebraska?

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Comment

Private Employer Drug Testing: Invading At-Will Employees' Privacy — Is it a Tort in Nebraska?

TABLE OF CONTENTS

I. Introduction 211
II. The Invasion of Privacy Tort 213
A. Appropriation 214
B. False Light Publicity 215
C. Disclosure of Private Matters 217
D. Intrusion Upon Seclusion or Solitude 218
III. The Current Law of Intrusion 218
A. The Intrusion Element 219
B. The "Highly Offensive" Element 224
IV. Violation of Public Policy: An Alternative to Intrusion .. 228
V. Avoiding Liability for Intrusion 230
A. Employer Defenses to Private, At-Will Employee Intrusion Claims 230
B. Employee Waivers 231
VI. Conclusion 232

I. INTRODUCTION

Employee privacy litigation is a relatively new and rapidly expanding area of employment law in the United States. Between 1985 and 1987 almost one hundred workplace privacy jury verdicts were reported with an average verdict of $316,000.[1] The potential for future expansion of employee privacy litigation is indicated in one survey which reports twenty times more workplace privacy jury verdicts were entered against employers in the period from 1985 to 1987 than in the period from 1981 to 1984.[2]

1. I. SHEPARD & R. DUSTON, WORKPLACE PRIVACY 1 (1987) [hereinafter WORKPLACE PRIVACY].
2. *Id.* at 2.

The rapid growth in employee privacy litigation is largely attributable to the growing tendency of employers to require their employees to undergo urinalysis drug testing as a condition of continuing employment.[3] As the number of employers requiring employee drug testing increases, it is reasonable to assume that employee privacy litigation will increase accordingly. Future increases in employee privacy litigation seem especially likely in light of the strong, conflicting interests of employers and employees in suits challenging the validity of mandatory employee drug testing programs.

Employers have strong interests in ensuring that their employees do not abuse alcohol or other drugs on the job. Employee alcohol abuse alone cost American industry approximately $50.6 billion in lost workforce productivity in 1980.[4] The sheer magnitude of employer losses attributable to employee alcohol and drug abuse provides a strong, legitimate incentive for employers to take affirmative steps to improve employee performance, workplace safety, and workplace security. Mandatory employee drug testing is rapidly becoming the employer's primary tool for protecting its interests.

Although employers have significant interests in ensuring a drug-free workforce, when employers elect to achieve that objective by requiring employee drug testing, their interests collide with significant employee privacy interests. The level of protection an employee receives against employer intrusions into employee privacy is largely a function of the individual employment setting.

Public sector employees have a greater degree of privacy protection than any other class of employee. Public employee drug testing raises issues of constitutional magnitude. Public employees have challenged their employers' drug testing programs on first, fourth, fifth, ninth, and fourteenth amendment grounds placing principal reliance on the fourth amendment's prohibitions against unreasonable searches and seizures. A number of courts considered the issue and determined public employee drug testing satisfied the fourth amendment's "reasonableness" requirement only when the required testing was based on "individualized reasonable suspicion" that the testee was under the influence of alcohol or illegal drugs while on duty.[5]

In contrast to their public sector counterparts, private employees enjoy no constitutional privacy protection against employer drug testing programs.[6] The amount of discretion a private employer has to

3. *Id.* at 1, 18-19.
4. Podolsky, *RTI Report: Economic Cost of Alcohol Abuse and Alcholism*, ALCOHOL HEALTH & RES. WORLD 34, 35 (Winter 1984-85).
5. *See, e.g.*, Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Feliciano v. City of Cleveland, 661 F. Supp. 578 (N.D. Ohio 1987); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).
6. Monroe v. Consolidated Freightways, Inc., 654 F. Supp. 661 (E.D. Mo. 1987).

unilaterally implement mandatory employee drug testing depends on whether its employees are represented by unions, have individual employment contracts of definite duration, or are at-will.

As a general rule, an employer must bargain with its employees' union representative before implementing mandatory employee drug testing, or face potential liability for unfair labor practices.[7] When a private employee has an individual employment contract of definite duration, the terms of the contract, either expressed or implied, will govern whether the employee can be required to undergo drug testing as a condition of continuing employment.[8]

Private sector, at-will employees comprise the class of employees most vulnerable to employer-mandated drug testing. In the absence of federal or state constitutional protections of their privacy, this class of employees is increasingly resorting to common law and statutorily created tort theories to challenge the validity of their employers' drug testing programs.

The scope of the following analysis is narrow and focused on the validity of employee drug testing programs in the private, at-will employment context. The purpose of the following analysis is also narrow—to analyze the applicability of Nebraska's statutorily created intrusion/invasion of privacy tort in the private, at-will employee drug testing context.[9]

II. THE INVASION OF PRIVACY TORT

The right of privacy is a relatively recent concept in Anglo-American law. The legal concept of the right of privacy was first articulated less than one hundred years ago in 1890, by Samual Warren and Louis Brandeis.[10] In their landmark law review article, Brandeis and Warren recognized that the broad principle of the right of privacy— "the right to be let alone"—was implicit in a number of common law defamation and property rights cases.[11] When reading their landmark work, it is hard to believe they were writing in 1890. They just as easily could have been talking about employee drug testing programs in 1987 when they stated:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern

7. Reynolds Elec. & Eng'g. Co., 125 L.R.R.M. (BNA) 1368 (1987) (advice memoranda NLRB general council).
8. True, *Common Law Principals Affecting Drug Testing of Employees*, 265-66 (June 25, 1987) (ABA Satellite Seminar: Drug Testing in the Workplace).
9. NEB. REV. STAT. §§ 20-201 to 211 (1986).
10. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter *Right to Privacy*].
11. *Id. See also* WORKPLACE PRIVACY, *supra* note 1, at 5.

> enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[12]

American courts grappled with this amorphous right for seventy years before William Prosser imposed a coherent structure on the right of privacy in 1960.[13] According to Prosser there are four distinct kinds of invasion of privacy interests under the classic theory of the right of privacy: 1) intrusion upon a person's solitude or seclusion; 2) public disclosure of private facts about a person; 3) publicity which puts a person in a "false light" in the public eye; and 4) appropriation of a person's name or likeness for the appropriator's benefit.[14]

This classic theory of the right of privacy has been adopted, with minor variations, in all fifty states.[15] Thirty-seven states have judicially recognized a common law right of privacy and the remaining thirteen states have created a right of privacy by statute.[16] Each of the four torts within the penumbra of the classic theory have been applied in the workplace context, with varying degrees of employee success.[17]

A. Appropriation

This branch of the invasion of privacy tort has no application in the employee drug testing context. Often referred to as the "right to publicity," the tort of appropriation protects individual property interests in the use of names and likenesses for the benefit of the appropriator.[18] The protection provided by Nebraska's appropriation statute is limited to appropriations for the "commercial" or "advertising" benefit of the appropriator.[19] In older employment cases, employees have sued their employer for appropriating their right to publicity, but

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12. *Right to Privacy*, *supra* note 10, at 196.
13. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
14. W. PROSSER & W. KEETON, TORTS § 117, at 851, 854, 856, 863 (5th ed. 1984). *See also* RESTATEMENT (SECOND) TORTS §§ 652B-652E (1977).
15. WORKPLACE PRIVACY, *supra* note 1, at 5.
16. *Right of Privacy, 1979: Hearings on L.B. 384 Before the Judiciary Comm. of the Nebraska Unicameral*, 10-11 (Feb. 6, 1979) [hereinafter *Hearings*]. (Statement by Sen. Landis noting Nebraska and Rhode Island were the only two states without a statutory or common law right of privacy). In 1980, Rhode Island joined the other forty-nine states and created a statutory right of privacy. *See* R.I. GEN. LAWS § 9-1-28.1 (1983 Cum. Supp.). For examples of other statutorily created rights to privacy see N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976); OKLA. STAT. ANN. tit. 21, § 839 (West 1982); UTAH CODE ANN. § 49-3-1 (1982); VA. CODE ANN. § 18.2-216.1 (1982).
17. WORKPLACE PRIVACY, *supra* note 1, at 6.
18. RESTATEMENT (SECOND) OF TORTS § 652C (1977). Section 652C expressly provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." *Id.*
19. Specifically, NEB. REV. STAT. § 20-202 (1986) provides: "Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy." Sec-

these efforts were generally unsuccessful.[20]

B. False Light Publicity

The false light invasion of privacy tort is designed to protect and provide relief to an individual for another's publication of matters concerning the individual which places the individual in a false light.[21] The matters disclosed must be given publicity such as media disclosure or disclosure to a large enough group of people that it is a substantial certainty the matter will become public knowledge.[22] The resulting false light must be highly offensive to a reasonable person. Additionally, the person making the disclosure must have acted with knowledge of, or reckless disregard as to, the falsity of the matter and the false light in which the disclosure would place the individual.[23]

Although false light invasion is closely related to defamation, one need not be defamed to successfully maintain a false light action.[24] The underlying facts that support a false light claim will not necessarily support a defamation claim; although, when the underlying facts are sufficient to support a defamation claim, such facts would also support a false light claim.

False light claims by employees against employers have generally been unsuccessful due to the employees' failure to satisfy the publicity element of such a claim.[25] In *Houston Belt & Terminal Ry. v.*

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tion 20-202 also exempts appropriations for bona fide news report and non-commercial, public interest advertising purposes. *Id.* at § 20-202(1).

20. *See, e.g.*, Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962) (Employee sued his employer for appropriation/invasion of privacy for employer's photographing him while he worked. Held: Employer's photographing employee for purpose of studies to increase efficiency of employer's operations and promote safety was not a violation of employee's right to privacy.).

21. RESTATEMENT (SECOND) OF TORTS § 652E (1977). Section 652E expressly provides:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Cf. NEB. REV. STAT. § 20-204 (1986). Nebraska's false light tort is defined in language identical to § 652E, except the statute expressly exposes "any person, firm, or corporation" to potential false light liability. *Id.*

22. RESTATEMENT (SECOND) OF TORTS § 652E comment a (1977).

23. *See id.* § 652E.

24. *See, e.g.*, Eastwood v. Cascade Broadcasting Co., 106 Wash. 2d 466, 468, 722 P.2d 1295, 1297 (1986); RESTATEMENT (SECOND) OF TORTS § 652E comment b (1977); W. PROSSER & W. KEETON, *supra* note 14, § 117, at 863.

25. *See, e.g.*, Dzierwa v. Michigan Oil Co., 152 Mich. App. 281, 393 N.W.2d 610 (1986) (Discharged employee sued former employer for false light invasion of privacy because of false statements made by employer's agent in the presence of other

Wherry,[26] an employee successfully maintained a defamation action against his former employer.[27] However, the facts in *Wherry* would have supported a false light claim as well as the successful defamation claim.

In *Wherry*, the employee was tested for drugs after involvment in an on-the-job accident and tested positive for methadone. One of the employer's officials noted on the accident report that methadone was used by heroin addicts for withdrawal treatment. Another employee sent a letter to the United States Department of Labor which stated a physician had determined traces of methadone were present in the former employee's system at the time of the accident.[28]

The former employee in *Wherry* won a jury verdict of $150,000 for injuries suffered as a result of the statements accusing him of being a drug user and $50,000 in punitive damages.[29] The Texas Civil Court of Appeals affirmed the jury verdict in its entirety.[30] Because the employer knew of the statement's falsity two weeks prior to the defamatory publication (after undergoing independent drug screening, the employee had tested negative for all common drugs), the court found the evidence supported the jury's defamation verdict.[31]

All the elements of a false light claim were present in *Wherry*. First, falsely disclosing that an employee was a drug user outside work placed the employee in a false light. Second, such a disclosure would be highly offensive to a reasonable person. Third, the employer's disclosure, after receiving the employee's negative test results, clearly constituted acting with knowledge or reckless disregard as to the falsity of the matters disclosed. Finally, the letter to the Department of Labor could arguably satisfy the publicity requirement. The employee would, therefore, have established a prima facie false light claim.[32]

Private sector employers who are using — or planning to implement — mandatory employee drug testing programs must have built-in disclosure control mechanisms to avoid the problems faced by the

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employees. Held: False light claim dismissed for failure to satisfy the publicity element as agent's statements were only made in the presence of a small number of employees and nothing indicated the statements were "broadcast to the public in general or publicized to a large number of people.") *See also* Eddy v. Brown, 715 P.2d 74 (Okla. 1986) (The court dismissed an employee's false light claim against his employer, supervisor, and foreman, holding that the fact that a limited number of co-workers heard the employee was undergoing psychiatric treatment was insufficient to satisfy the publicity element because the disclosure was not to the general public.).

26. 548 S.W.2d 743 (Tex. Civ. App. 1976).
27. *Id.*
28. *Id.* at 745-48.
29. *Id.* at 743.
30. *Id.*
31. *Id.* at 743, 748, 755.
32. *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977).

employer in *Wherry*. Any communications to third parties concerning an employee's drug test results should be narrow, factual, and privileged. If such communications are true and nonconclusary, the employee who is the subject of the communication will be unable to establish a false light claim.[33]

C. Disclosure of Private Matters

The purpose of this branch of the classic theory is to protect and provide relief to an individual for another's publication of matters concerning the individual's private life.[34] The matters disclosed must be given publicity such as media disclosure or disclosure to a large enough group of people that there is a substantial certainty that the matter will become public knowledge.[35] Moreover, the disclosure must be highly offensive to a reasonable person and not of legitimate concern to the public.[36]

A cause of action based on wrongful disclosure of private information does not exist in Nebraska.[37] When the Nebraska legislature enacted the statutory right of privacy, it incorporated only three of the four branches of the classic theory, declining to adopt the "publicity of private matters" branch. The wrongful disclosure of private matters tort exists in other states, however, and employees have had some success in bringing this action against their employers.[38] In this branch, an employee's wrongful disclosure action against the employer could be based on a variety of private facts such as sexual relations, family

33. *See* Ledl v. Quik Pik Food Stores, Inc., 133 Mich. App. 583, 349 N.W.2d 529 (1984) (Discharged employee sued former employer for false light invasion of privacy based on employer's subsequent communication to another concerning the reason for her discharge. Held: Trial court properly dismissed the employee's false light claim because such a claim could not be grounded on the employer's communication of the reasons for her discharge to another when the employee did not dispute she had been discharged for the reasons communicated.).

34. RESTATEMENT (SECOND) OF TORTS § 652D (1977). Section 652D provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

35. *Id.* at comment a.

36. *See id.* § 652D.

37. *See* NEB. REV. STAT. §§ 20-201 to 211 (1986).

38. *Compare* Levias v. United Airlines, 27 Ohio App. 3d 222, 500 N.E.2d 370 (1985) *with* Bratt v. International Business Machs. Corp., 785 F.2d 352 (1st Cir. 1986). In *Levias*, a flight attendant's employer was held liable for disclosure of private facts invasion of privacy due to a medical examiner's disclosure of the attendant's confidential medical information to her supervisor. However, in *Bratt*, the court employed a balancing test, holding that the employer's business interests in publishing medical information concerning an employee's psychiatric problems to the employee's supervisors outweighed the employee's privacy interests.

quarrels, intimate letters, or medical information.[39]

D. Intrusion Upon Seclusion or Solitude

The intrusion branch of the classic theory protects an individual from intentional intrusions by others—physical or otherwise—upon the individual's solitude, seclusion, or personal affairs.[40] A plaintiff in an intrusion action needs to establish only two essential elements to make out a prima facie case: 1) that the defendant intruded upon the plaintiff's solitude or seclusion; and 2) that the intrusion would be highly offensive to a reasonable person.[41]

The intrusion/invasion of privacy tort has been recognized as the most applicable of the four branches of the classic theory for private, at-will employees to successfully challenge the validity of their employers' drug testing programs.[42] The intrusion action is especially appealing to employees because there is no publicity or publication requirement for a successful intrusion action.[43] "The intrusion itself makes the defendant subject to liability, even though there is no publication or any use of any kind of photograph or information" obtained by the intrusion.[44] Thus, even if an employer takes no action against an employee who tests positive for illegal drugs, the employer may be liable for intrusion upon the employee's solitude if the employee can satisfy the critical element of the "highly offensive" nature of the intrusion.[45]

III. THE CURRENT LAW OF INTRUSION

As of this writing, no court has rendered a decision in an intrusion action challenging a private employer's mandatory drug testing program.[46] Moreover, no intrusion cases of any kind were reported in Nebraska as of December 1987.[47] However, a survey of court decisions

39. RESTATEMENT (SECOND) OF TORTS § 652D comment b (1977).
40. *Id.* § 652B. Section 652B provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another . . . is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."
41. *Id.*
42. WORKPLACE PRIVACY, *supra* note 1, at 26.
43. RESTATEMENT (SECOND) OF TORTS § 652B comment b (1977).
44. *Id.*
45. *See id.* § 652B.
46. WORKPLACE PRIVACY, *supra* note 1, at 26.
47. It is not too surprising that no intrusion cases were reported in Nebraska because the Nebraska legislature did not enact the statutory right of privacy until eight years ago. 1979 Neb. Laws 394. However, an employee recently filed an intrusion action against his former employer based on the private employer requiring its employees to submit to drug testing as a condition of continuing employment. Rogers v. Excel Corp., No. 8143 Dist. Ct. Colfax County, Neb. (filed Oct. 28, 1987). With the passage of these statutory privacy rights, the legislature effectively re-

in other states considering intrusion claims in various contexts will provide a basic understanding of what an employee must show to establish a prima facie case of intrusion upon solitude.

A. The Intrusion Element

As a threshold matter, no intrusion exists where the employee has no legitimate expectation of privacy. In *Kemp v. Block*,[48] the plaintiff brought a wrongful disclosure action against his former employer and a former co-worker who had recorded the plaintiff's argument with his foreman. The *Kemp* court granted summary judgment in favor of the defendants.[49]

The court reasoned that the plaintiff had no legitimate expectation of privacy. The plaintiff and his foreman had argued in loud voices in a small work area where the co-worker had a right to be, and where the argument could be overheard by all co-workers who were present.[50] Given these factors, the court determined that the plaintiff had displayed neither a subjective nor an objective expectation of privacy.[51]

In determining that the plaintiff employee had no legitimate expectation of privacy, the *Kemp* court articulated a two-tiered analysis as follows:

> The determination of whether [the plaintiff employee] had a legitimate expectation of privacy involves two lines of inquiry: First, by his conduct, the plaintiff must have exhibited an actual (subjective) expectation of privacy, i.e., he must have shown that he sought to preserve his conversation with [his former foreman] as private. Second, it must be decided whether the plaintiff's expectation, viewed objectively, was . . . one that society is prepared to recognize as reasonable.[52]

Courts considering the reasonableness of public employee drug testing have applied this two-tiered test to determine whether employees had legitimate privacy expectations which were intruded upon by the drug test "search and seizure" regardless of whether the "search" was reasonable under the fourth amendment.[53] For example, in *Lovvorn v. City of Chattanooga*,[54] the court, relying on United States

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sponded to the Nebraska Supreme Court's holding that there was no common law right of privacy in Nebraska. *See* Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955) (court dismissed plaintiff's right of privacy claim based on the appropriation of his name and reputation for the defendant's commercial benefit reasoning the right did not exist in Nebraska common law).

48. 607 F. Supp. 1261 (D. Nev. 1985).
49. *Id.* at 1262, 1265.
50. *Id.* at 1264.
51. *Id.*
52. *Id.*
53. *See, e.g.*, Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).
54. 647 F. Supp. 875, 879 (E.D. Tenn. 1986) (city's requiring fire fighters to undergo

Supreme Court precedent, held that public employees had to show a legitimate expectation of privacy to invoke the fourth amendment's protection. The *Lovvorn* court determined that public employees had a legitimate expectation of privacy in the information contained in their bodily fluids based on the application of the two-tiered test.[55]

Thus, in the public employee drug testing context, absent a reasonable expectation of privacy, there can be no intrusion upon employees' privacy interests.[56] It follows that this reasonable expectation showing will be carried over in future drug testing cases involving intrusion claims by private, at-will employees. Courts considering these claims would be justified in requiring employees to show their reasonable expectation of privacy in the information contained in their bodily fluids because the employees must show the intrusion was one upon their "seclusion or solitude." Furthermore, absent a reasonable expectation of privacy, it is doubtful that an employee could satisfy the requirement that the intrusion be "highly offensive to a reasonable person."

As a practical matter, it should be fairly easy for private, at-will employees to make the requisite "reasonable expectation" showing. The courts considering public employee drug testing challenges have almost uniformly held, absent special circumstances, that public employees have a reasonable expectation of privacy in the information contained in their bodily fluids.

K-Mart Corp. v. Trotti[57] was an intrusion case in which the court required a private, at-will employee to satisfy the two-tiered "reasonable expectation" test to establish that the employer intruded upon the employee's solitude.[58] *Trotti* arose when an employee brought an action against her employer after management personnel searched her locker and the personal effects therein.[59] The employee had secured, with managment's knowledge, her locker with her own lock.[60]

The *Trotti* court determined that the employee had displayed a legitimate, reasonable expectation of privacy in the locker and its contents.[61] The court explained the interrelationship between showing a reasonable expectation of privacy and establishing the intrusion element as follows:

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mandatory, random drug testing held unconstitutional violation of fourth amendment's prohibition against unreasonable searches and seizures due to lack of individualized reasonable suspicion directed at persons to be tested). *See also* Smith v. Maryland, 442 U.S. 735 (1979); Schmerber v. California, 384 U.S. 757 (1966) (blood tests subject to fourth amendment constraints).

55. Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 879-81 (E.D. Tenn. 1986).
56. *Id.* at 879.
57. 677 S.W.2d 632 (Tex. Ct. App. 1984).
58. *Id.*
59. *Id.* at 635.
60. *Id.*
61. *Id.* at 638.

> [A]n employee in this situation, by having placed a lock on the locker, at the employee's own expense and with the [employer's] consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it.
>
> . . .[T]here is no question the [employer] invaded the [employee's] privacy by opening the locked locker. . . .
>
> The [employer's] improper intrusion of an area where the [employee] had manifested the expectation of privacy alone raised her right to recover.[62]

In short, there are two sub-elements an employee must satisfy in order to establish the intrusion element: 1) proof of the intrusion itself; and 2) subjective and objective proof (two-tiered test) of a legitimate, reasonable expectation of privacy (solitude or seclusion). As earlier discussion indicated, private, at-will employees should be able to show a legitimate expectation of privacy in the information contained in their bodily fluids.[63] However, the question remains whether an employer's requiring that employees submit to urinalysis drug testing constitutes an intrusion.

Courts which have considered the validity of public employee drug testing have almost unanimously concluded a public employer "intrudes" upon its employees' privacy by requiring them to submit to drug tests.[64] The United States District Court for the District of New Jersey provided an excellent summary of the aspects of employee drug testing supporting a conclusion of intrusion in *Capua v. City of Plainfield*.[65] In *Capua*, the court held that drug testing constituted a high degree of bodily intrusion, reasoning that human dignity and privacy are adversely affected when an individual is forced to engage in a private bodily function in a government agent's presence.[66] The *Lovvorn* court echoed this sentiment and stated, "[m]ost people, including fire fighters, have a certain degree of subjective expectation of privacy in the act of urination."[67]

Employers may be tempted to avoid the intrusion problem by allowing employees to fill a specimen bottle in private. However, as long as the employer requires the employee to hand over the specimen bottle for analysis, there is an actionable intrusion. It defies logic and common sense to say there is an actionable intrusion when employees are accompanied by observers when filling their specimen bottles, but

62. *Id.* Note that the court emphasized the intrusion must be "improper," for example, it must be highly offensive to a reasonable person. *Id.* at 637. *See also supra* note 43 and accompanying text.

63. *See supra* notes 53-56 and accompanying text.

64. *Id.*

65. 643 F. Supp. 1507 (D.N.J. 1986) (mandatory "surprise" drug testing of all city fire fighters held unreasonable/unconstitutional under the fourth amendment due to lack of individualized reasonable suspicion that any fire fighter was using illegal drugs on duty).

66. *Id.* at 1514, 1518.

67. Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986).

no actionable intrusion when employees fill their specimen bottles in private and are compelled to hand the bottles over to the employer for analysis. Regardless of whether an observer is present at the employee's act of urination, the result is the same — the employer has compelled access to private information from the employee's bodily fluids.

An employer intrudes upon its employee's solitude when it requires the employee to hand over the specimen as much as when it intrudes and takes the specimen from the employee. Adoption of a "hand over/take" distinction would create an artificial barrier to recovery. A required "handing over" by the employee certainly constitutes the equivalent of a "taking" by the employer.

Nebraska's intrusion/invasion of privacy tort is defined in the Nebraska statutes at section 20-203. Section 20-203 provides: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her *place of* solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for an invasion of privacy."[68]

Although this definition of the intrusion tort is similar to the Restatement (Second) of Torts definition and the common law or statutory definitions of other states, the Nebraska legislature has qualified protected solitude or seclusion with the words "place of."[69] This unique language raises the question whether a private employer's requirement that its employees submit to urinalysis drug testing constitutes an intrusion into the employee's "place of" solitude or seclusion.

The answer to this question hinges on whether a narrow or broad construction is placed on the qualifying language. It could be argued that the words "place of" were meant to narrow the scope of protected solitude or seclusion to cover only those places physically separate from the person. However, a review of the legislative history of section 20-203 reveals a legislative intent supporting a broader reading, indicating an intent to include protection from physical intrusions of the person within the meaning of "place of" solitude under section 20-203.[70]

Senator Landis, the privacy bill's sponsor, stated the intent of the proposed legislation was to incorporate "the accepted legal definitions of the right of privacy which safeguard an individual's right against (1) intrusion upon the plaintiff's *physical and mental* solitude or seclusion."[71]

The qualifying language was not in the original version of section

68. NEB. REV. STAT. § 20-203 (1986) (emphasis added).
69. *Compare* NEB. REV. STAT. § 20-203 (1986) *with supra* notes 40-41 & 64-67 and accompanying text.
70. *Hearings, supra* note 16 (introducer's, Sen. Landis', statement of intent).
71. *Id.* (emphasis added).

20-203. The term "place of" was inserted into the bill at the request of the Nebraska media to limit "minor irritant" lawsuits that could result from legitimate reporting practices.[72] The media representative who proposed the qualifying language at a hearing before the judiciary committee originally placed a narrow construction on the "place of" term, stating: "It is our feeling that most of the law in this direction and in this area [intrusion] has been directed toward a place, whether it be a home, a restroom, [or] any place one would reasonably expect solitude or seclusion, but it should be limited to a place."[73]

However, when asked whether the media intended the language to specify particular protected places of solitude or seclusion, the media representative responded:

> I don't think there's any intention to specify any particular place. I think any place of solitude or seclusion, any room, any place you would expect to have privacy . . . would certainly be included. I'm only suggesting that the term place be included to suggest that we're not saying that somebody walking down a public street . . . can have his privacy intruded upon by say somebody that says hello.[74]

Clearly, the media's purpose for requesting the insertion of the "place of" term into section 20-203 was to protect its ability to report the news.[75] It is equally clear that the media did not intend its proposed insertion to exclude intrusions upon the person from the coverage of section 20-203.[76] The media representative recognized that "there can be eavesdropping, there can be mechanical devices, bugs which may trespass or intrude upon a person."[77] If it is nothing else, drug testing constitutes intrusive accessing of private information by chemical and mechanical means which are comparable to eavesdropping by mechanical devices. Although not conclusive, the current Nebraska legislature believes employee privacy interests are implicated when their employers require them to submit to drug testing.[78] The legislature has a drug testing regulation bill before it which has as its broad purpose the balancing of employer workplace interests with employee privacy interests.[79]

In summary, the courts considering public employee drug testing have determined drug testing constitutes an intrusion into the em-

72. *Id.* at 23, 24 (statement of Alan Peterson, Nebraska media representative).
73. *Id.* at 23.
74. *Id.* at 23-24.
75. *Id.*
76. *Id.* at 23.
77. *Id.*
78. L.B. 582, 90 Leg., lst Sess., (1987) (legislation proposed to regulate and set standards for employee drug testing introduced during 1987 session and carried over to 1988 session) (legislative statement of intent) (L.B. 582 has been passed by the legislature and signed by the governor).
79. *Id.*

ployee's legitimate expectation of privacy.[80] The Nebraska legislature originally intended the intrusion tort to protect against intrusions on a person's mental and physical solitude.[81] Although no Nebraska court has interpreted the "place of" term contained in the definition of the intrusion tort, the legislative history of section 20-203 indicates the original legislative intent remained unaltered by the insertion of the qualifying language into the intrusion tort's definition.[82] Therefore, the Nebraska Supreme Court will probably determine that employee drug testing is an intrusion upon the person which is a "protected place of solitude or seclusion" within the meaning of section 20-203 when this issue reaches the court.[83]

B. The Highly Offensive Element

The plaintiff in an intrusion action must establish, in addition to intrusion upon his seclusion or solitude, that the intrusion by the defendant was "highly offensive" to a reasonable person.[84] The question of under what conditions mandatory private, at-will employee drug testing is highly offensive to a reasonable person promises to be the most contentious issue of future intrusion cases. Although no Nebraska court has yet considered the issue, courts in other jurisdictions have produced mixed results in determining what intrusion the plaintiff must show to establish the highly offensive to a reasonable person requirement.[85]

One federal court, considering a private, at-will employee's intrusion claim in the exercise of its diversity jurisdiction held that the employee failed to meet the burden of showing employer-mandated drug testing was a "blatant and shocking disregard of his rights [causing] serious mental or physical injury or humiliation to himself."[86]

In *Satterfield v. Lockheed Missiles & Space Co.*, the court did not state any rationale for rejecting the employee's intrusion claim, but

80. *See supra* notes 64-67 and accompanying test.
81. *See supra* note 71 and accompanying text.
82. *See supra* notes 72-77 and accompanying text. The Nebraska Supreme Court may have an opportunity to interpret the qualifying "place of" language of § 20-203 in the near future. *See supra* text accompanying note 47.
83. *See* NEB. REV. STAT. § 20-203 (1986).
84. *See supra* notes 40-41 and accompanying text.
85. *Compare* Baldwin v. First Nat. Bank, 362 N.W.2d 85 (S.D. 1985) (answer and counterclaim by debtor in collection action alleging "oppressive, willful and intentional" bad faith collection tactics on creditor's part held sufficient to support debtor's intrusion counterclaim) *with* Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985) (private, at-will employee failed to establish the "highly offensive" element of intrusion/drug testing required as part of annual employee physical; court failed to provide reasoning to support this determination).
86. Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1370 (D.S.C. 1985) (applying South Carolina law).

the fact that the drug screen was added to the employee's required annual physical (which the employee apparently implicitly consented to) was probably a factor in its holding that the employee had failed to establish the "highly offensive" element.[87] As the following discussion will indicate, absent consent, the *Satterfield* plaintiff may have been able to establish the drug screen was highly offensive, even assuming it was a mere addition to a required employee physical examination.

Most courts will probably find *Satterfield* little help in deciding whether private, at-will employee drug testing is highly offensive to a reasonable person in a given case. In *Satterfield*, the invasion of privacy claim was poorly plead, and the court based its decision to grant summary judgment in favor of the employer on the employee's failure to satisfy the publicity element of the "publication of private matters" privacy tort.[88] Absent interpretive help from private sector employee intrusion cases, courts considering intrusion claims in the future will get the greatest guidance for determining whether the private, at-will employee has established the highly offensive nature of the drug test intrusion from public employee drug testing cases.[89]

Of course, in the public employee drug testing cases the courts have not determined whether the intrusion was highly offensive to a reasonable person. Rather, they have decided the substantially comparable issue of whether the intrusion was unreasonable under the fourth amendment.[90] Absent special factual circumstances, "[a]ll courts which have ruled upon the validity of urine tests for public employees, . . . have required as a prerequisite [to a finding the search/intrusion was reasonable] some articulable basis for suspecting that the employee was using illegal drugs, usually framed as 'reasonable suspicion.' "[91]

87. *Id.* at 1360, 1369-70.

88. *Id.* at 1369-70.

89. *See supra* notes 5, 53-57 and accompanying text.

90. *See, e.g.*, Feliciano v. City of Cleveland, 661 F. Supp. 578, 587-89 (N.D. Ohio 1987) (mandatory drug testing of all police academy cadets held unreasonable under fourth amendment in absence of reasonable suspicion that a specific cadet was using alcohol or illegal drugs on duty); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880-83 (E.D. Tenn. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1520 (D.N.J. 1986).

91. Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 881 (E.D. Tenn. 1986) (stating general rule of required reasonable suspicion showing for public employee drug testing to satisfy fourth amendment's reasonableness requirement). For cases illustrating "special facts," see National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (drug testing requirement, absent reasonable suspicion, held reasonable because testing was not a condition of continued employment, but only a condition of obtaining a desirable position which involved carrying a firearm); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (random drug testing of corrections employees held constitutional under the fourth

The "reasonable suspicion" standard was implicitly adopted by a majority of the United States Supreme Court in *O'Conner v. Ortega*[92] as the correct standard for determining whether the search of a public employee's office desk by his supervisor was reasonable under the fourth amendment.[93] In *O'Conner*, the Court balanced the public employer's interest in supervision, control, and efficient operation of the workplace against the employee's legitimate expectation of privacy, concluding that the reasonable suspicion standard was the appropriate measure of the reasonableness of the desk search for work-related purposes.[94]

The individualized reasonable suspicion standard has also been used as a baseline for judging the offensiveness of a private employer's intrusion into the solitude of one of its at-will employees. In *K-Mart Corp. v. Trotti*,[95] the search of the employee's locker by the employer's management personnel was held highly offensive to a reasonable person. The *Trotti* court found the lack of individualized reasonable suspicion for the search of the employee's locker conclusive on the issue of whether the intrusion was highly offensive. "[T]he [employer's] search of the [employee's] locker and purse was wrongful. The mere suspicion either that another employee had stolen watches, or that unidentified employees may have stolen price-marking guns was insufficient to justify the [employer's] search of [the employee's] locker and personal possessions without her consent."[96]

The reasonable suspicion standard is a logical and desirable baseline for judging whether private, at-will employee drug testing is highly offensive in a given case. Use of the term "baseline" means absence of individualized reasonable suspicion as prima facie, and possibly per se, evidence of the high offensiveness of the drug test intrusion/search. Application of the reasonable suspicion standard to private, at-will employee drug testing would promote uniformity in judging the propriety of both public and private employer-mandated drug testing programs.[97]

The *Trotti* court's reasonable suspicion/highly offensive analysis would be readily applicable to private, at-will employees' intrusion suits opposing employer-mandated drug testing. Because *Trotti* involved an employer's search of an employee's locker, it involved

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amendment due to special "compelling" institutional security/public safety interests, making random intrusions acceptable to society as reasonable).

92. 107 S. Ct. 1492 (1987) (plurality and Scalia, J., concurring).

93. *Id.*; *see also* Feliciano v. City of Cleveland, 661 F. Supp. 578, 596 (N.D. Ohio 1987).

94. O'Conner v. Ortega, 107 S. Ct. 1492, 1501-03 (1987).

95. 677 S.W.2d 632, 640 (Tex. Ct. App. 1984).

96. *Id.*

97. *See supra* notes 90-91 and accompanying text (public employee drug testing cases applying the reasonable suspicion standard to fourth amendment "reasonableness" determinations).

searching of an employee's place of solitude. Employee drug testing is, at the very least, a search/intrusion into the employee's solitude or seclusion.[98]

A final factor supporting the application of a reasonable suspicion standard to offensiveness determinations in private, at-will employee drug testing cases is the maxim that public employees, by virtue of having accepted public employment, have a lesser degree of legitimate privacy expectations than that of their private sector counterparts.[99] Given this higher degree of "legitimate expectation" in private sector employees, it would be contradictory for a court to say that drug testing public employees absent reasonable suspicion offends the constitution, but drug testing private employees, who have a higher expectation of privacy, under the same circumstances is not highly offensive.

Therefore, courts considering future intrusion claims challenging the validity of drug testing programs for private, at-will employees should adopt the individualized reasonable suspicion standard to determine whether the drug testing intrusion was highly offensive to a reasonable person. This standard's adoption would provide a workable baseline for making offensiveness determinations and it would provide consistency between offensiveness determinations in private sector drug testing cases and constitutional offensiveness determinations in public sector drug testing cases. Finally, logic dictates that a drug testing search of a public employee, who has a reduced expectation of privacy, which is "constitutionally offensive" absent reasonable suspicion would be "highly offensive" to a reasonable person where the drug testing search involves a private sector employee, who has an increased expectation of privacy absent reasonable suspicion.

The "highly offensive" element of an intrusion claim should be subjected to the same reasonable suspicion analysis under Nebraska law as that discussed above. The language of the Nebraska intrusion tort's "highly offensive" element requiring that the intrusion upon solitude be "highly offensive to a reasonable person" mirrors the language of the Restatement's intrusion tort and the language relied on by the *Trotti* court in making its "highly offensive" determination.[100] The same policy, uniformity, workability, logic, and common sense

98. *See supra* note 90 and accompanying text (examples of public drug testing cases holding drug testing constitutes an intrusive search into the employee's privacy).

99. *See, e.g.*, Feliciano v. City of Cleveland, 661 F. Supp. 578, 588 (N.D. Ohio 1987); Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 880 (E.D. Tenn. 1986); Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. App. 1985).

100. *Compare* NEB. REV. STAT. § 20-203 (1986) *with* RESTATEMENT (SECOND) OF TORTS § 652B (1977) *and* K-Mart Corp. v. Trotti, 677 S.W.2d 632, 637 (Tex. Ct. App. 1984) (holding highly intrusive element a fundamental part of the intrusion/invasion of privacy tort).

factors which support application of the reasonable suspicion standard to "highly offensive" determinations in the abstract are supportive of concrete application of the reasonable suspicion standard to "highly offensive" determinations under section 20-203. Thus, Nebraska courts should adopt the reasonable suspicion standard for evaluating the offensiveness of an employer-mandated drug testing requirement in future intrusion claims brought by private, at-will employees.

IV. VIOLATION OF PUBLIC POLICY: AN ALTERNATIVE TO INTRUSION

Although alluded to in the prior discussion of the intrusion upon solitude element of an intrusion/invasion of privacy claim, it is important to expressly recognize the main drawback to the intrusion claim from the employees' viewpoint. Employees must submit to the drug testing intrusion to successfully maintain an intrusion claim. In intrusion cases in which the employees refused to submit to the employer's intrusion, the courts have summarily dismissed the employees' intrusion claims for failure to state a prima facie case through failure to establish the intrusion element.[101]

For example, in *Gretencord v. Ford Motor Co.*,[102] the federal district court granted summary judgment in favor of the employer on the employee's intrusion claim because the employee refused to allow the employer's agents to search his car as he left the employer's premises at the end of a workday. The *Gretencord* court stated that the employee had failed to state an intrusion claim. "[The employee] has failed to establish that any intrusion took place. He admits that he refused to allow [the employer's] agents to search his vehicle. Having successfully thwarted the commission of the alleged tort, [the employee] can not now sue for damages as a result of an act that did not occur."[103]

Additionally, in the public employee drug testing context, the federal district court in *Everett v. Napper*[104] held that the required drug testing of city fire fighters did not constitute a "search" of the plaintiff firefighter because he had refused to submit to testing.

For private, at-will employees who neither wish to submit to drug testing nor to be discharged for refusing to submit, a suit for wrongful discharge in violation of public policy may be a viable alternative to an intrusion suit in order to challenge a private employer's ability to mandate employee drug testing as a condition of continuing employ-

101. *See, e.g.*, Gretencord v. Ford Motor Co., 538 F. Supp. 331 (D. Kan. 1982); Everett v. Napper, 632 F. Supp. 1481 (N.D. Ga. 1986).
102. 538 F. Supp. 331, 333-34 (D. Kan. 1982).
103. *Id.* at 333.
104. 632 F. Supp. 1481, 1484 (N.D. Ga. 1986).

ment. Although at-will employees can generally be discharged for any reason or no reason at all, many state courts have adopted public policy exceptions to this "at-will" doctrine when the employer's motivation for firing an at-will employee contravenes public policy.[105]

The Nebraska Supreme Court recognized a public policy exception to the at-will doctrine for the first time in *Ambroz v. Cornhusker Square Ltd.*[106] In *Ambroz*, a private employer discharged an at-will employee because the employee refused to submit to a polygraph test.[107] The court relied on the express terms of a Nebraska statute, section 81-1932, and held that the discharge of an at-will employee for refusing to submit to a polygraph test was a violation of public policy.[108] Section 81-1932 provides, in relevant part: "No employer or prospective employer may require as a condition of employment or as a condition of continued employment that a person submit to a [polygraph] examination . . . ."[109]

The *Ambroz* court reasoned that section 81-1932, in clear and unambiguous language, expressed the public policy promulgated by the Nebraska legislature that obtaining or continuation of private employment cannot be conditioned on an employee's/applicant's submission to a polygraph test.[110] The *Ambroz* court also articulated the standard to determine whether to recognize a public policy exception in future wrongful discharge cases.

> We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted to exceptions created by statute or those instances where a very clear mandate of public policy has been violated.[111]

Based on the standard for recognizing public policy exceptions to the at-will doctrine in Nebraska, a private, at-will employee can make a fairly convincing argument that discharge from employment for refusing to submit to a highly offensive drug test intrusion constitutes a discharge in violation of public policy.

The Nebraska legislature has expressed its intent to provide a right of privacy to all natural persons "as described and limited by" the pro-

105. *See, e.g.*, Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (private employer's discharge of at-will employee for refusal to submit to polygraph test was wrongful discharge in violation of public policy because of state statute prohibiting employers from conditioning continued employment on employee submission to polygraph and "similar" tests); Ambroz v. Cornhusker Square, Ltd., 226 Neb. 889, 416 N.W.2d 520 (1987).

106. 226 Neb. 899, 416 N.W.2d 510 (1987).

107. *Id.* at 900, 416 N.W.2d at 512.

108. 226 Neb. 899, 901, 903-05, 416 N.W.2d 510, 512-15 (1987).

109. NEB. REV. STAT. § 81-1932 (1981).

110. Ambroz v. Cornhusker Square, Ltd., 226 Neb. 889, 903, 416 N.W.2d 510, 514 (1987).

111. *Id.* at 905, 416 N.W.2d at 515.

visions of the right of privacy statute.[112] Thus, Nebraska's intrusion tort represents a clear mandate of public policy in favor of protecting individuals from highly offensive intrusions into their solitude or seclusion by "any person, firm, or corporation."[113]

Assuming protecting individuals from highly offensive intrusions upon their solitude or seclusion is clearly mandated public policy in Nebraska, the question arises whether discharging a private, at-will employee for refusing to submit to an intrusion such as drug testing, absent individualized reasonable suspicion, would constitute a wrongful discharge in violation of public policy. Although section 20-203 does not expressly restrict private sector employer actions with respect to their at-will employees, it does impose civil liability on "any person, firm, or corporation" that commits a highly offensive intrusion upon "any natural person in his or her place of solitude or seclusion."[114] Therefore, a strong argument exists that a private employer (any person, firm, or corporation) which discharges an at-will employee (any natural person) for refusing to submit to a highly offensive drug testing intrusion (clearly mandated public policy) constitutes a wrongful discharge in violation of public policy.

V. AVOIDING LIABILITY FOR INTRUSION

A. Employer Defenses to Private, At-Will Employee Intrusion Claims

The provision of Nebraska's right of privacy statute which sets out defenses to invasion of privacy actions grants sweeping protection to defendants in certain types of invasion of privacy actions.[115] For example, a defendant in an appropriation action or a false light action would have available "[a]ll applicable federal and Nebraska statutory and constitutional defenses [and] . . . all applicable, qualified, and absolute privileges and defenses in the common law of privacy in [Nebraska] and other states.[116] It is highly questionable, however, whether a defendant in an intrusion case in Nebraska has any Nebraska common law privileges or defenses. In 1955, the Nebraska Supreme Court decided, in *Brunson v. Ranks Army Store*,[117] that the right of privacy did not exist in the common law of Nebraska.[118] Since no common law right of privacy existed when the statutory right of privacy was enacted in 1979, no common law privileges and defenses existed for the Nebraska legislature to recognize.

112. NEB. REV. STAT. § 20-201 (1986).
113. *Id.* § 20-203.
114. *Id.*
115. *Id.* § 20-206.
116. *Id.*
117. 161 Neb. 519, 73 N.W.2d 803 (1955).
118. *Id.*

Although other defenses listed in section 20-203 are viable, most of these defenses are inapplicable to intrusion cases. The main common law defenses to invasion of privacy suits are justifications for publicizing the private matter or image in false light and appropriation cases.[119] These justification defenses are irrelevant in intrusion cases because their purpose is to rebut the publicity element of an invasion of privacy claim, and publicity is not an essential element of a prima facie intrusion case.[120]

Given the inapplicability of common law justification defenses to intrusion actions, the employer's best line of defense is to attack the "highly offensive" element. In employee drug testing intrusion cases, evidence of an individualized reasonable suspicion that the employee required to submit to drug testing was impaired by alcohol or illegal drugs while on duty would support a conclusion that the intrusion was reasonable. Such evidence would rebut the "highly offensive" element.[121]

B. Employee Waivers

Obtaining voluntary waivers of intrusion claims from employees before requiring them to submit to drug testing may be a valid method for an employer to insulate itself from exposure to potential intrusion liability. Although no court has ruled on the validity of such a waiver in the private, at-will employee drug testing context, the EEOC's guidelines for a valid private waiver of a claim under the Age Discrimination in Employment Act (ADEA) establish objective criteria for determining whether the employee's waiver was made "voluntarily" and "knowingly."[122] Specific criteria are listed in the guidelines which would support an employee's waiver.

> 1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims. . . .
> 2) A reasonable period of time was provided for employee deliberation; [and]
> 3) The employee was encouraged to consult with an attorney.[123]

Although a court would not necessarily require the presence of all of the above criteria to hold an employee waiver of an intrusion claim valid, the court would certainly require the waiver to be made voluntarily and knowingly.[124] Thus, if an employer incorporates EEOC waiver guidelines into its procedures for obtaining employee waivers of drug testing intrusion claims, a court would be more likely to find

119. *See* NEB. REV. STAT. §§ 20-202, 20-206(2)(3) (1986).
120. *See supra* notes 40-43 and accompanying text.
121. *See supra* notes 90 & 91 and accompanying text.
122. *Legislative Regulations and Administrative Exemptions Allowing for Non-EEOC Supervised Waivers Under the ADEA*, 29 C.F.R. § 1627, Daily Lab. Rep. (BNA) 146 DLRG-1, 1987 (July 31, 1987).
123. *Id.*
124. *Id.*

the waiver valid by virtue of its being knowing and voluntary. The result is that the employer avoids both the liability and litigation costs of defending against an intrusion claim.

VI. CONCLUSION

Private employers' increasing reliance on employee drug testing as their primary tool for protecting their workplace safety, security, and efficiency interests is a primary cause of the rapid growth of workplace privacy litigation. The future growth of employee intrusion/invasion of privacy claims will be largely attributable to private, at-will employees' discovery of the intrusion tort's simplicity and applicability to private employer-mandated drug testing programs.

In order to establish that the required drug testing constituted an intrusion upon the employee's place of solitude or seclusion, the private employee will have to establish a legitimate, reasonable expectation of privacy in the area intruded upon by the employer. In general, employees will usually be able to establish that they have a legitimate expectation of privacy in the information contained in their bodily fluids. Thus, satisfying the "intrusion upon solitude" element should be a fairly easy matter for employees in drug testing intrusion cases.

The individualized reasonable suspicion standard is a logical and workable baseline for testing whether the drug test intrusion is highly offensive to a reasonable person. Under this proposed standard, requiring an employee to submit to drug testing, absent individualized reasonable suspicion, would constitute prima facie (and possibly per se) evidence to satisfy the "highly offensive" element.

The bulk of common law and statutory defenses to invasion of privacy claims are designed to attack the publicity element of appropriation and false light claims. Thus, because publicity is not a part of a prima facie intrusion case, most defenses will be unavailable to private employers defending against drug testing intrusion claims by their at-will employees. Therefore, the employer's best defense against an employee intrusion claim is to attack the "highly offensive" element by showing that the required drug testing was based on individualized reasonable suspicion.

Employers will also want to consider obtaining employee waivers of their intrusion claims, prior to requiring drug testing, as a preventive alternative to limit the employer's exposure to potential intrusion liability. If a private employer can establish the at-will employee's waiver of the employee's statutory right was made knowingly and voluntarily, the employer will avoid the litigation and liability costs of defending against a subsequent drug testing intrusion claim by the employee.

Finally, employees who are discharged for refusing to submit to private employer-mandated drug testing programs cannot, as a matter

of law, satisfy the intrusion upon seclusion element. However, private, at-will employees in this situation may be able to convince a Nebraska court that discharging an employee for refusing to allow a tortious intrusion upon solitude or seclusion constitutes a wrongful discharge in violation of public policy.

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